AND
RIEFS

No. 15-1194

In the *Supreme Court of the United States*

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF RESPONDENT

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QUESTION PRESENTED

To confront the threat sexual predators pose to children, the North Carolina Legislature enacted a statute that forbids registered sex offenders from accessing "commercial social networking Web sites" that permit minors to become members. N.C. Gen. Stat. §14-202.5. Petitioner, a registered sex offender, was convicted of violating the statute by creating and accessing a Facebook page. Facebook's terms of use expressly forbid convicted sex offenders from using the site. The question presented is:

Whether the North Carolina Supreme Court correctly held, applying intermediate scrutiny, that the prosecution of petitioner under Section 202.5 did not violate the First Amendment.

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STATEMENT

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982). North Carolina, like all States, makes it a crime to sexually assault or abuse a child. And, coming at the problem from a different direction, North Carolina requires convicted sex offenders to register with the State and report on changes in residence. The problem persisted, however, in part because of the special challenges posed by sexual predators' use of social networking sites on the Internet.

Sexual predators became increasingly adept at using social media to gather intimate information about minors' social lives, families, hobbies, hangouts, and the like. They then used this information to target unwitting victims, either in person or online, in the guise of familiarity or shared interests. The State Legislature enacted North Carolina General Statute §14-202.5 ("Section 202.5") in response. It prevents registered sexual offenders—who are "much more likely than any other type of offender to be rearrested for a new rape or sex assault," *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal quotation marks omitted)—from accessing those social networking websites.

Section 202.5 comports with the First Amendment. It is content neutral, regulating only convicted individuals' *access* to a particular place irrespective of what they would say there. It furthers an undis-

putedly compelling government interest. Other proposed approaches to addressing sex offenders' use of social media would be less effective. And sex offenders have myriad alternative channels of communication. This Court should reject petitioner's challenge to the law.

A. Statutory Background.

In 1995, the North Carolina Legislature enacted North Carolina's "Sex Offender Registration Program" in an effort to protect minors from sexual predators. *See* N.C. Sess. Laws 1995-545; N.C. Gen. Stat. §14-208.5 *et seq.* The legislation detailed its purpose, specifically noting "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment" and that "persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State." N.C. Gen. Stat. §14-208.5. The legislation stated that its purpose was "to assist law enforcement agencies' efforts to protect communities" from such offenses. *Id.*

North Carolina's sex offender registry applies to sex offenders who have committed crimes against minors and those who have committed "sexually violent offenses." The registerable offenses in the latter category are:

- First degree rape;
- Second degree rape;

- First degree forcible sexual offense ("engag[ing] in a sexual act against another person by force" with additional aggravating factors);
- Second degree forcible sexual offense ("engag[ing] in a sexual act against another person by force" or with a person who is mentally disabled, mentally incapacitated, or physically helpless);
- Sexual battery ("engag[ing] in sexual contact with another person . . . by force" or with a person who is mentally disabled, mentally incapacitated, or physically helpless);
- Subjecting or maintaining a person for sexual servitude;
- Incest between near relatives; and
- Promoting the prostitution of or patronizing a prostitute who is a minor or mentally disabled person.

See id. §§14-208.6(4)(a), (5).[1] A registered sex offender may petition to be removed from the registry after 10 years of registration, but unless his petition is granted the sex offender must remain on the registry for 30 years. *Id.* §14-208.6A.

In 2008, in an additional effort to confront the problem of sexual predators, the General Assembly

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[1] *See also* N.C. Dep't of Justice, Law Enforcement Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* 4-5 (Sept. 2014). Two of the registerable offenses relate to sexual activity by school personnel with a "student" of a primary or secondary school. The vast majority of such students are, of course, minors.

enacted the statute at issue here—N.C. Gen. Stat. §14-202.5 ("Ban use of commercial social networking Web sites by sex offenders"). This legislation forbids registered sex offenders from accessing certain "commercial social networking Web sites" that minors frequent. *See id.* Through Section 202.5, North Carolina sought to address the menace of registered sex offenders seeking out new, unsuspecting victims via "cyberspace." Through this modern method, a sex offender can remain invisible on a social networking site while gaining intimate and detailed information about children who use the site. Offenders use that information to prey on them.

To convict a registered sex offender for violating Section 202.5, the State must show that the offender accessed a commercial social networking website where the offender knows the site permits minor children to become members or to create personal web pages on the site. *Id.* §14-202.5(a). The State further must establish that the site possesses the following attributes:

— It is a private, commercial, revenue-producing site. *Id.* §14-202.5(b)(1).

— It is a "social networking site" that allows for the social introduction between people. *Id.* §14-202.5(b)(2).

— It is a site that allows users to create pages or profiles that are capable of containing the user's name or nickname, photographs, other personal information, and links to other personal

web pages on the site belonging to friends or associates. *Id.* §14-202.5(b)(3).

— It is a site that provides its users at least one mechanism to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger. *Id.* §14-202.5(b)(4).

Access to any websites that do not meet *all* of these criteria is not restricted under the statute. *See id.* §14-202.5(b). In addition, North Carolina's statute exempts from its reach any site that "[p]rovides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." *Id.* §14-202.5(c)(1). The statute also does not apply to a site that "has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." *Id.* §14-202.5(c)(2).

B. Facts.

On May 20, 2002, a Grand Jury in Cabarrus County, North Carolina indicted petitioner, then 21 years old, on two counts of statutory rape of a 13-year-old child. *See* Cabarrus County File Nos. 02 CRS 8475 and 02 CRS 8476. Pursuant to a plea bargain, petitioner entered a plea of guilty to taking indecent liberties with a child. *See* Cabarrus County Super. Ct., Judgment, No. 02CRS008475 (Sept. 16,

2002). Upon petitioner's conviction, he was ordered to register as a sex offender. R. 72.[2]

Petitioner posted a message on Facebook on April 27, 2010, praising God in the wake of dismissal of a traffic citation. Tr. 134-35. He knew this violated Section 202.5, J.A. 138-40, but thought the law is "ridiculous" as applied to him since he is "not a pedophile."[3] Petitioner's posting also breached Facebook's terms of service, which provide that "[y]ou will not use Facebook if you are a convicted sex offender."[4]

In April 2010, Corporal Brian Schnee, a supervisor in the juvenile investigation division of the Durham, North Carolina Police Department, was working to identify registered sex offenders who were illegally accessing commercial social networking websites. Tr. 132.[5] While perusing Facebook, Officer Schnee found a user profile page that (based on the profile photo) he believed belonged to petitioner—whom Schnee had previously determined was a registered sex offender living in Durham. *Id.*

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[2] Citations to "R. __" refer to the printed Record on Appeal, filed in the North Carolina Court of Appeals.

[3] John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, Indyweek (May 29, 2013).

[4] Facebook, Terms of Service, Statement of Rights and Responsibilities, Registration and Account, item 6 (available at www.facebook. com/legal/terms).

[5] Citations to "Tr. __" refer to the transcript of the trial proceedings in Durham County, North Carolina Superior Court.

at 132-34. On the Facebook page, petitioner was using the fictitious name "J.r. Gerrard" instead of his own name. *Id.* at 133-34; R. 77.

To confirm that J.r. Gerrard was petitioner, Officer Schnee went to the Durham County Clerk of Court's office and obtained a certified copy of the traffic citation and dismissal petitioner had referred to in his posting. *Id.* at 135-36. Based on this and additional information, Officer Schnee obtained a search warrant for petitioner's residence. *Id.* at 142.

During the search, Officer Schnee found and seized a picture of petitioner which was the same picture the officer had seen on the Facebook page; and seized other items corroborating petitioner's identity as the person who had opened and used a Facebook account. *Id.* at 152, 153, 157. Officer Schnee also seized a notice of "Changes to the North Carolina Sex Offender Registration Laws," which petitioner had signed, describing the websites that Section 202.5 prohibited him from accessing. *Id.* at 155-56.

C. Lower Court Proceedings.

1. Petitioner was indicted for violating Section 202.5. At trial, he moved to dismiss on the ground that the statute violated his First Amendment right to free speech. The trial court denied the motion, Pet. App. 54a-65a, and the North Carolina Court of Appeals denied his request for interlocutory review. Following a trial, a jury convicted petitioner.

2. Petitioner appealed to the North Carolina Court of Appeals, which reversed the conviction. *Id.* at 35a-53a. The Court of Appeals ruled that Section 202.5 is a content-neutral speech regulation subject to intermediate scrutiny. And although it found "that the State has a significant interest in protecting minors from predatory behavior by sex offenders on the internet," *id.* at 46a, the court concluded that the statute is not narrowly tailored because it applies to sex offenders whose offenses involved adults and therefore might not be "a current threat to minors," *id.* at 48a.

The Court of Appeals also ruled that Section 202.5 is unconstitutionally vague. Disregarding limiting constructions proposed by the State, the court found that "the statute could be interpreted to ban registered sex offenders from accessing sites such as Google.com and Amazon.com." *Id.* at 51a. In its vagueness analysis, the court did not address whether petitioner's conduct—accessing Facebook—was clearly proscribed.

3. The North Carolina Supreme Court reversed, holding that Section 202.5 does not violate the First Amendment or the Due Process Clause. *Id.* at 1a-27a. The court stated that, although social networking websites provide both a forum for gathering information and a means of communication, the essential purpose of Section 202.5 is to limit sex offenders' conduct, namely, "access[ing] certain carefully-defined Web sites." *Id.* at 9a. After finding that the statute is content neutral, the court con-

cluded that it should be assessed under the four-part intermediate-scrutiny test set out in *United States v. O'Brien*, 391 U.S. 367 (1968). *Id.* at 12a.

The court noted that the parties agreed that the statute satisfied the first two factors of the *O'Brien* test: whether the statute is within the government's constitutional powers and whether it furthers a substantial government interest. The court next ruled that the statute satisfies the third *O'Brien* factor, which asks whether the government interest is unrelated to the suppression of free expression. The court found that the statute's purpose is to "protect[ ] children from convicted sex offenders who could harvest information to facilitate contact with potential victims," an interest "unrelated to the suppression of free speech." *Id.* at 13a-14a.

The court then focused on the fourth *O'Brien* factor, which the court found to be the same as the test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989): whether the statute is narrowly tailored and leaves open "ample alternative channels for communication." Applying that test, the North Carolina Supreme Court concluded that Section 202.5 is narrowly tailored. The court observed that the statute contains specific exceptions for websites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. And it found that, even assuming petitioner's broad reading of the statute, it "leave[s] open ample alternative channels for communication." *Id.* at 16a (quoting *Ward*, 491 U.S. at 791). The court pointed to the

types of sites expressly excluded by the statute and the myriad other sites that do not fall within its terms. The court further noted that non-web-based methods of communication such as text messaging, FaceTime, and electronic mail remain open to petitioner.

After distinguishing the statutes struck down in a few other jurisdictions, *id.* at 18a-19a, the North Carolina Supreme Court rejected petitioner's as-applied, overbreadth, and vagueness challenges. As to overbreadth, the court found that "the statute is drafted carefully to limit its reach by establishing four criteria that must be met before access to a commercial social networking Web site is prohibited" —factors which "ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target." *Id.* at 25a. As to vagueness, the court held that such a challenge "cannot be raised by a defendant"—such as petitioner—"whose conduct falls squarely within the scope of the statute." *Id.* at 27a.

SUMMARY OF ARGUMENT

Section 202.5 does not violate the First Amendment. The law is a content-neutral time, place, or manner regulation subject to intermediate scrutiny, and it survives such scrutiny because it is narrowly tailored to serve the government's surpassingly important interest in protecting minors from sexual abuse.

I. Section 202.5 is content neutral. The statute does not target speech based upon the topics addressed or messages expressed. Rather, it is a crime-prevention measure that bars registered sex offenders from *accessing* social networking sites, regardless of what they wish to do there. That Section 202.5 applies only to a subset of speakers is a virtue, not a vice. The statute applies to registered sex offenders not because of any content preference on the State's part, but because sex offenders are far more likely than others to abuse children. Section 202.5 falls within the nation's long tradition of imposing civil disabilities on persons convicted of crimes based on the increased likelihood they will commit future crimes.

This Court regularly has treated laws that regulate *where* speech may take place as time, place, and manner restrictions subject to intermediate scrutiny. Contrary to petitioner's claims, a government may adopt a time, place, and manner restriction not only to solve administrative problems such as managing incompatible uses of public property, but also to further interests as varied as protecting residential privacy, promoting local aesthetics, and, as here, preventing crime. Petitioner is also wrong in asserting that "preventative" measures may not receive intermediate scrutiny. This Court has applied intermediate scrutiny to, for example, buffer zones and zoning laws designed to prevent problems before they occur.

II. Section 202.5 satisfies this Court's intermediate scrutiny test. Correctly interpreted, Section 202.5 bars registered sex offenders from accessing only true social networking sites that allow users to create personal pages *and* link to other personal pages of their friends or associates—*i.e.*, sites where sex offenders could actually gather information about minors—not from accessing sites such as nytimes.com. In fact, there is not a single real-world example of any registered sex offender who has been convicted under Section 202.5 for accessing a non-social-networking site. Under this correct interpretation of the statute, the law is narrowly tailored to serve the State's substantial government interest in protecting minors, and leaves open ample alternative channels for communication.

There is no doubt, and petitioner does not dispute, that North Carolina has a substantial interest in protecting children from the heinous crime of sexual abuse. Section 202.5 directly furthers that interest. Existing laws had proved inadequate; sexual predators were increasingly using social networking sites as a tool for targeting children; and registered sex offenders are far more likely than members of the general public to sexually abuse a minor. Barring that group from using social media to surreptitiously harvest information about potential victims is a valuable and sensible means of combatting the problem.

Section 202.5 need not be the least restrictive means of furthering the State's objective; it need

only promote the State's interest in a way that would be achieved less effectively absent the regulation. It does. First, Section 202.5 is not overbroad. The law applies to registered sex offenders who have been convicted of crimes against adults because a significant percentage of such offenders seek vulnerable victims regardless of age. Nor is it overbroad because it is preventative. This Court has upheld preventative laws when more direct criminal prohibitions were not effective.

Second, none of the hypothetical alternatives proposed by petitioner would be nearly as effective. Some simply repeat laws and practices already in operation in 2008 when North Carolina enacted Section 202.5. Some can be enforced only after predators have harvested information online and sexually abused a child. For example, a law that prohibited only using a social networking website to harvest information for an improper purpose could only be enforced after the abuse had taken place. And others—such as a law requiring parental permission before children can use social media—may not be constitutional and would be of dubious value. There is simply no alternative to Section 202.5 that would be both administrable and as effective.

Section 202.5 also leaves open ample alternative means for communication on the Internet. Because Section 202.5 includes only true social networking sites that meet all of its statutory criteria, it leaves open vast other options on the Internet, including adult-only social networking sites, non-

commercial social networking sites, social networking sites with limited features, government sites, commercial sites like eBay, Yelp, and Amazon.com, and countless non-social-networking sites like nytimes.com. Section 202.5 thus survives intermediate scrutiny.

III. Petitioner's claim fails whether cast as an as-applied or a facial challenge. As to the former: Petitioner was convicted for accessing Facebook, a site to which the ban plainly applies and which bars sex offenders. Section 202.5 thus did not deprive him of access to any forum in which he otherwise would have been entitled to speak or listen. To the extent petitioner is raising an argument on behalf of other sex offenders under the doctrine of overbreadth, this argument also fails. No showing has been made that any of the statute's applications would be unconstitutional, let alone a "substantial amount" of the them as required for a successful overbreadth claim.

ARGUMENT

Few crimes are as damaging and tragic as the sexual predation of children. States have diligently tried to eradicate these crimes over the years, but have met with only limited success. Among the problems facing State law enforcement are staggeringly low reporting rates and the inherent difficulty of catching perpetrators who are strangers. The North Carolina Legislature concluded that, if these crimes were not being effectively deterred, the predators had to be stopped before they began their attacks. Section 202.5 aims to accomplish that by

making it harder for registered sex offenders—who have a notoriously high recidivism rate—to harvest intimate information about their intended victims.

Section 202.5 does not bar registered sex offenders from saying anything. It instead prevents them from accessing a particular forum, one that studies (and experience) confirm is a regular and effective tool of predation. The statute, therefore, is a content-neutral restriction on the time, place, or manner of protected speech. Such laws are constitutional if "they are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791 (internal quotation marks omitted). Section 202.5 meets that test.

I. Section 202.5 is a Content-Neutral Time, Place, or Manner Regulation Subject to Intermediate Scrutiny.

The key dividing line in First Amendment law is whether or not a regulation "target[s] speech based on its communicative content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* By contrast, the Court has "afforded the government somewhat wider leeway to regulate features of speech unrelated to its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

Content-neutral laws that affect speech come in many forms. As relevant here, "the government may impose [content-neutral] reasonable restrictions on the time, place, or manner of protected speech" if they are narrowly tailored to serve significant governmental interests and leave open ample alternative channels for communication. *Ward*, 491 U.S. at 791. Section 202.5 does not "target speech based on its communicative conduct"; it instead imposes a reasonable restriction on the place where certain speech may be made. The law is therefore subject to intermediate, not strict, scrutiny.

A. Section 202.5 is content neutral.

1. North Carolina's limitation on sex offenders' access to social networking websites is content neutral. As this Court recently explained, a "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. By contrast, a law is content neutral if its restrictions are "*justified* without reference to the content of the regulated speech." *Boos v. Barry*, 485 U.S. 312, 320 (1988) (plurality). "The principal inquiry," therefore, "in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.

North Carolina adopted Section 202.5 for the same reason it adopted its sex offender registration regime—because "sex offenders often pose a high

risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat. §14-208.5. In short, the law is a crime-prevention measure.

Section 202.5's operation does not turn on "the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. Whether sex offenders "violate the Act 'depends' not 'on what they say,' but simply on where they say it." *McCullen*, 134 S. Ct. at 2531 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)). Section 202.5 therefore does not deny them the "prized American privilege to speak one's mind" on particular topics. *Bridges v. California*, 314 U.S. 252, 270 (1941).

The facts of this case are illustrative. Petitioner violated Section 202.5 because he intentionally accessed Facebook "to do any of the activities or actions" one may do there. N.C. Gen. Stat. §§14-202.5, -202.5A. The specific words he later posted or read were irrelevant. Similar to the abortion-clinic buffer zone at issue in *McCullen*—which a person could have violated "merely by standing in a buffer zone, without displaying a sign or uttering a word"—the content of the communications did not matter. 134 S. Ct. at 2531.

2. Without disputing any of this, petitioner nonetheless contends that Section 202.5 is content based because it targets "a subset of speakers." Pet'r Br. 40. But "[s]o long as" distinctions between speak-

ers "are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994). Petitioner does not contend that Section 202.5 "is a subtle means of exercising a content preference," and for good reason—it is not.

North Carolina limited Section 202.5's coverage to registered sex offenders because they are the persons most likely to use social networking sites as a prelude to sexual predation. *See* §II(B), *infra*. The State did not select them because of the political, religious, cultural, or other views they might have or wish to express on social media. The same cannot be said of the laws at issue in the cases cited by petitioner (Pet'r Br. 40-41). The governments crafted those laws specifically to favor (or disfavor) speech with particular communicative content. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (law prohibiting advertising of lotteries and casino gambling); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (ordinance barring only commercial publications from using "free-standing newsracks"); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (ordinance barring all picketing—except "peaceful labor picketing"—next to a school).

Indeed, petitioner has it exactly backwards. That Section 202.5 applies only to convicted sex offenders *supports* subjecting it to intermediate scrutiny. This nation has a long tradition of impos-

ing civil disabilities on persons convicted of crimes even after they completed their criminal sentences. Such persons, as a class, have been barred from keeping and bearing arms, *see District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), from voting, *see Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), from serving on a jury, *see* 28 U.S.C. §1865(b)(5), and from holding public office, *see Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985). They have also been barred from enlisting in the military, *see* 10 U.S.C. §504(a), from receiving a security clearance, *see* 10 U.S.C. §§504, 986(c)(1), and from entering certain professions, *see North Carolina v. Rice*, 404 U.S. 244, 247 n.1 (1971).

Sex offenders, in particular, have been subjected to a variety of registration, reporting, and residency restrictions, that could not have been imposed on the public at large. *See Kennedy v. Louisiana*, 554 U.S. 407, 455-58 & nn.2-5 (2008) (Alito, J., dissenting) (listing federal and state laws). Governments have imposed, and courts have upheld, these laws based on the predictive judgment that sex offenders are far more likely to commit future crimes than other citizens. *See Smith v. Doe*, 538 U.S. 84, 103 (2003) (upholding sex offender registration and notification law); *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016) (upholding residency requirement).

This does not mean, of course, that States may without cause deprive convicted persons of all their First Amendment rights. It does mean that States

and the federal government have greater leeway when dealing with this class of individuals than when dealing with the general public.

B. Section 202.5 is a time, place, or manner regulation.

1. Section 202.5 bars registered sex offenders from accessing particular (virtual) locations. Rather than regulating the *content* of speech, the law regulates the *place* where speech may be made. It is therefore a classic time, place, or manner law. This Court has regularly analyzed laws that bar access to specific locations where speech would otherwise take place as time, place, or manner laws. *See, e.g.*, *McCullen*, 134 S. Ct. 2518 (law creating 35-foot buffer zone around abortion facilities); *Frisby v. Schultz*, 487 U.S. 474 (1988) (law banning picketing around residences); *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981) (law limiting location at which religious literature could be distributed at a state fair).[6]

2. Petitioner resists that conclusion based on his idiosyncratic view that the only true time, place, or manner regulations address "administration"

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[6] Although the North Carolina Supreme Court concluded that Section 202.5 regulates conduct, that conclusion makes no difference to the analysis here because, as explained in the Brief in Opposition (at 21-22), the *O'Brien* test that applies to regulations of conduct that incidentally affect speech "'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" *Ward*, 491 U.S. at 798 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984)).

problems, such as the fact that "'[t]wo parades cannot march on the same street simultaneously.'" Pet'r Br. 38 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)). Not so. While some "time, place, or manner" cases involved competing parades or potential traffic disruptions, in others the government interest had nothing to do with incompatible uses of public property.

For example, in *Frisby* the Court held that a local "ordinance that completely bans picketing 'before or about' any residence" was a time, place, or manner regulation. 487 U.S. at 484. Finding that it furthered the city's interest in "the protection of residential privacy," the Court upheld the provision. *Id.* And in *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994), the Court treated a ban on signs on private homes—enacted for aesthetic reasons—as a time, place, and manner regulation (though it concluded the ban failed intermediate scrutiny). *See also Los Angeles v. Taxpayers v. Vincent*, 466 U.S. 789, 809 (1984) (applying intermediate scrutiny to law enacted to "eliminat[e] visual clutter").

In addition, the Court has subjected to intermediate scrutiny time, place, or manner laws designed to "control noise levels," *Ward*, 491 U.S. at 792; laws designed to prevent a "threat to . . . security or peace," *Boos*, 485 U.S. at 330; and laws "designed to prevent crime," *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

3. Nor is petitioner correct that Section 202.5 is not a time, place, or manner regulation because of its

"global . . . scope" and the large number of people who use some of the affected websites. Pet'r Br. 37. Section 202.5's scope matters when *applying* intermediate scrutiny. It does not control whether the law is a time, place, or manner regulation *subject to* intermediate scrutiny.

4. Petitioner lastly insists that Section 202.5 merits strict (indeed, fatal) scrutiny, not intermediate scrutiny, because it is a "preventative measure[]." Pet'r Br. 29. That contention lacks merit.

This Court has applied intermediate scrutiny to many "preventative" laws. Buffer zones around abortion clinics are one example. Although the Court in *McCullen* was deeply divided over whether the state law was content-neutral, no Justice disagreed that a content-neutral buffer zone constitutes a time, place, or manner law. And that is so even though such buffer zones are designed to "ensur[e] public safety outside abortion clinics [and] prevent[] harassment and intimidation of patients and clinic staff"—all of which could have been directly proscribed. 134 S. Ct. at 2537; *see also Hill v. Colorado*, 530 U.S. 703, 724 (2000).

This Court's secondary effects cases likewise subject "preventative" measures to intermediate scrutiny. In *Renton*, the Court applied intermediate scrutiny to, and upheld, a law that banned adult theaters from locating within 1,000 feet of residential areas. 475 U.S. at 46-49. The Court did so even though the law was preventative in nature; it tried to stop crime indirectly through zoning measures

rather than through new criminal laws or greater enforcement of criminal laws already on the books. *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (plurality) (applying intermediate scrutiny to ordinance "aimed at combating crime").[7]

The cases upon which petitioner relies, Pet'r Br. 30-34, are readily distinguishable. He focuses mainly on the series of cases establishing the "clear and present danger rule," which later became the "imminent lawless action" rule announced in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*). In those cases, however, the government acted based on the content of the speech—for example, the encouragement of communism and the overthrow of our government. The cases prove only that *content-based* laws are presumptively invalid, even if they are justified as preventative measures; they tell us nothing about how to assess *content-neutral* laws justified as crime-prevention measures.

Likewise, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which petitioner relies on at length, Pet'r Br. 31-34, involved a content-based law. *Free Speech Coalition* invalidated a federal statute prohibiting the possession and distribution of "virtual child pornography"—a category of speech protected, the Court held, by the First Amendment. There is a world of difference between banning a category of

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[7] As discussed in §II(C)(1), *infra*, the Court has upheld several preventative content-*based* measures, concluding that they were necessary to accomplish the government's compelling interests. *See Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Burson v. Freeman*, 504 U.S. 91 (1992).

protected speech (be it non-obscene pornography, videos depicting cruelty to animals, or violent video-games) and regulating the time, place, or manner of protected speech. *Free Speech Coalition* involved the former; this case involves the latter.

Nor, finally, does *Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating statute prohibiting all door-to-door distribution of "handbills, circulars or other advertisements"), hold to the contrary. To be sure, as petitioner notes, Pet'r Br. 30, *Martin* rejected the city's rationale that "burglars frequently pose as canvassers." *Id.* at 144. But whereas the law in *Martin* proscribed *all* canvassing by *all* persons based on the speculation that some burglars use canvassing as a device for planning or carrying out their crimes, Section 202.5 is far different. It does not prohibit all use of the Internet by all persons; it bans access to a few sites by a small percentage of the population. Simply put, *Martin* involved a plainly overbroad statute that altogether eliminated a traditional form of communication. It hardly stands for the proposition that the First Amendment bars any and all laws designed to prevent crimes by making it harder for potential criminals to commit them.

In the end, as with his "global scope" argument, petitioner takes an argument for why Section 202.5 supposedly does not satisfy intermediate scrutiny and wrongly uses it as an argument for why the law is not subject to intermediate scrutiny in the first place. But whether the law is narrowly tailored does

not determine the nature of the narrow-tailoring inquiry itself. For the reasons set forth above, the intermediate-scrutiny narrow-tailoring test set out in *Ward* applies.

II. Section 202.5 Satisfies Intermediate Scrutiny.

Content-neutral time, place, or manner laws are valid if "they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. As petitioner concedes, the government does not have to prove the law is the "least restrictive or least intrusive means" of achieving the government's interest. *Id.* at 798. Instead, "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799. Put another way, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. Section 202.5 satisfies that test. Having found that other, more direct, methods of combatting sexual violence against children failed, North Carolina tried a new method—preventing the most likely offenders from accessing personal information about children which they could then use to commit the offense. Other approaches proposed by

petitioner have already been tried and failed or would manifestly be less effective. And registered sex offenders have ample alternative ways by which they can communicate or receive any messages they wish, to whomever they wish. To understand why, it is necessary as an initial matter to explain Section 202.5's scope.

A. Section 202.5 prohibits access only to true social networking sites such as Facebook, not sites such as nytimes.com.

Petitioner's contention that Section 202.5 sweeps too broadly, and bars access to more speech than is needed to further the State's interest, rests in part on his misreading of the law's scope. Although he no longer contends that the statute is unconstitutionally vague, he still maintains that it sweeps in non-social-networking sites such as nytimes.com. *See, e.g.*, Pet'r Br. 8, 22, 46, 57. It does not. It bars registered sex offenders from accessing only sites that (unlike nytimes.com) contain the hallmark of social networking media—the ability to link to the personal pages of other "friends" on the same site.

The starting point, of course, is "the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). To meet the definition of "social networking site" under Section 202.5(b), the site must allow the user to include *all* the information listed in subsection (b)(3), which includes the ability to link to other users' pages. *See* N.C. Gen. Stat.

§202.5(b)(3) ("Allows users to create Web pages or personal profiles that contain information such as the name and nickname of the user, . . . other personal information about the user, *and* links to other personal Web pages on the commercial social networking site of friends or associates of the user that may be accessed by other users or visitors to the Web site" (emphasis added)). The site must also meet the requirements of subsection (b)(4), which requires that users be able "to communicate with other users" by "a message board, chat room, electronic mail, *or* instant messenger" (emphasis added).

Sites such as nytimes.com, Google.com, and Amazon.com are therefore not covered because they do not allow for the creation of personal user pages that link to other users' personal pages while also providing a message board, chat room, email, or instant messaging platform. This construction of Section 202.5 accomplishes its undisputed purpose: to prevent registered sex offenders from accessing information about minors by viewing a personal page containing identifying information about the creator of the page, and which can link to other such pages on the site. And it accords with common sense: "[A]s a matter of natural meaning, an educated user of English would not describe" sites such as

nytimes.com or Amazon.com as social networking sites. *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).[8]

This interpretation of the statute is supported by the constitutional doubt doctrine. "It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). This Court will seek "an interpretation which supports the constitutionality of legislation." *Parker v. Levy*, 417 U.S. 733, 756 (1974). Section 202.5 is readily susceptible to a narrow interpretation that limits its coverage to those sites that allow users to link to other users' pages.

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[8] Nor is petitioner correct in asserting, Pet'r Br. 23, that "access" to Facebook is complete when "a person arrives at an innocuous landing page." The dictionary definition of "access" as "[t]he act of approaching" contains a clarification as to computer access: "**Usage Note**: the verb *access* is well established in its computational sense 'to obtain access to (data or processes).'" American Heritage Dictionary 8 (3d ed. 1997). This comports with the definition the North Carolina legislature gave "access" in the provision following and cross-referencing Section 202.5:

> For the purposes of this section, "access" is defined as allowing the sex offender to do any of the activities or actions described in G.S. 14-202.5(b)(2) through G.S. 14-202.5(b)(4) by utilizing the Web site.

N.C. Gen. Stat. §14-202.5A. "Access" to Facebook's data and processes does not occur simply by landing on Facebook's log-in page.

Petitioner and his amici are wrong when they suggest that the North Carolina Supreme Court rejected the State's interpretation and adopted his. Pet'r Br. 46; Cato Br. 10; Reporters Committee Br. 5. The court expressly noted that the many statutory criteria a site must meet to be banned "ensure that registered sex offenders are prohibited from accessing *only* those Web sites where they could *actually gather information about minors* to target." Pet. App. 15a (emphasis added). "Outside these limits, registered sex offenders are free to use the Internet." *Id.*

And although the North Carolina Supreme Court did not definitively reject petitioner's list of "numerous well-known Web sites" he thought he could not access, neither did the court approve it. Rather, the court found "that even where defendant is correct, the Web offers numerous alternatives that provide the same or similar services that defendant could access without violating N.C.G.S. §14-202.5." Pet. App. 16a-17a. We are therefore left without definitive state court guidance on the issue, but with the strong suggestion that it encompasses only true social networking sites, as colloquially understood.

Section 202.5's prosecution history does not show otherwise. Petitioner relies upon statistics garnered from a small independent newspaper in proclaiming that the law has been used to prosecute more than 1000 people since its enactment. But he has produced not even *one* real-world case in which the State of North Carolina pursued charges for a sexual offender's access of nytimes.com,

Amazon.com, or some other non-social-networking site. The State agreed to dismiss the case in the much-cited example of an offender who was charged for using Skype,[9] which plainly does not fall under the statute because it does not allow for the creation of personal user pages that link to others' personal pages while also providing a message board, chat room, email, or instant messaging platform.

B. Section 202.5 furthers a significant government interest.

To be narrowly tailored, a time, place, or manner regulation must, first, "promote[] a substantial government interest." *Ward*, 491 U.S. at 799. Section 202.5 promotes the compelling government interest in protecting children from sexual predators.

1. This Court has specifically held that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 757. After all, "[t]he sexual abuse of children is heinous beyond words," *Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003), and the psychological effects of the crime often haunt victimized children for the rest of their lives. As this Court has recognized, for example, "sexually exploited children" may be "unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Ferber*, 458 U.S. at 758 n.9. Thus, "[s]ex offenders

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[9] *See State v. Dwayne H. Davis*, Halifax County Case No. 11CRS53996 (charge dismissed on October 21, 2013).

are a serious threat in this Nation," especially given that the victims of sexual assault are most often juveniles. *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal quotation marks omitted).

Section 202.5 is part of a national effort to address the problem. *See Kennedy*, 554 U.S. at 455-58 & nn.2-5 (Alito, J., dissenting) (discussing and listing various federal and state measures). The North Carolina sex-offender registry law recognizes "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment" and that protecting children from sex offenses "is of great governmental interest." N.C. Gen. Stat. §14-208.5. The Legislature enacted Section 202.5 to better achieve that objective.

2. When it enacted Section 202.5, North Carolina already had on the books laws making it a crime to sexually assault a child, *see* N.C. Gen. Stat. §§14-27.21 to -27.33, to attempt to do so, §14-2.5, to take indecent liberties with a child, §14-202.4, and to stalk a child, §14-277.3A. And, of course, North Carolina already had a sex offender registry. §§14-208.5 to -208.44. The crisis continued unabated. *See* My Sister's Place, *Sexual Assault Statistics*, http://www.mysisters.place/sexual-assault-statistics (stating that in 2008, when the Legislature enacted Section 202.5, North Carolina prosecutors filed more than 4200 charges for sexual crimes against

nors).[10] The Legislature therefore tried a different tack: making it more difficult for potential sex offenders to obtain information they often use to help them commit their offenses.

Section 202.5 does this by barring registered sex offenders from accessing social networking websites. The Legislature concluded that the law would further its crime-prevention objective because (1) existing methods addressing sexual abuse of children were not succeeding; (2) sexual predators commonly use social networking sites to cull information about minors; and (3) registered sex offenders are proportionately far more likely than members of the general public to sexually assault minors.

Existing efforts at addressing sexual predation of children were failing. Law enforcement has long struggled to track down and arrest child predators. Only "[t]hirty percent of juvenile sexual assaults are reported to police." David Finkelhor & Richard Ormrod, *Reporting Crimes Against Juveniles*, Juvenile Justice Bulletin 3 (DOJ Nov. 1999). And only 3.3 percent of hands-on sex offenses, such as rape or child molestation, result in an arrest. U.S. Department of Justice, *Sex*

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[10] These included 778 charges for first degree rape against a child, 1442 charges for first degree sex offenses against a child, 1861 charges for sexual exploitation of a minor, and 72 charges against school personnel for taking indecent liberties with students. Given the underreporting of sexual crimes, the true number of victims was undoubtedly much higher.

Offender Management Assessment and Planning Initiative 91 (2014) ("DOJ Sex Offender Report").[11]

Part of the problem was that "[a]rrests are less likely when the perpetrator is a stranger, which reflects the greater difficulty in locating the offender to complete an arrest." David Finkelhor et al., *The Justice System for Juveniles: A Comprehensive Model of Case Flow*, 6 Trauma, Violence & Abuse 83 (2005). Children's prevalent use of social media exacerbated the problem because sex offenders who choose their victims through social networking are often hard to identify. *See, e.g.*, Online Predators/Internet Predators (March 14, 2012), http://www.minormonitor.com/resource/online-predators/. That is especially true "if the predator never actually contacted the victim using the social networking site but instead just used it to gain a wealth of information that made the victim an easy target." *Id.*

Sexual predators commonly use social networking sites to cull information about minors. With traditional efforts failing, North Carolina focused on predators' use of the Internet because social networking had become an increasingly common tool of sexual predators. One study found that "48.5% of online child sexual exploitation reports received were linked to social network-

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[11] The Report was prepared by DOJ's Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. It is available at http://smart.gov/ SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.

ing sites, of which Facebook is only one." Christopher Hope, *Facebook is a 'major location of online child sexual grooming', head of protection agency says*, The Telegraph (Oct. 15, 2013).[12] Another study showed that "in 82 percent of online sex crimes against minors, the offender used the victim's social networking site to gain information about the victim's likes and dislikes," and "in 62 percent of online sex crimes against minors, the offender used the victim's social networking site to gain home and school information about the victim." Kimberly Mitchell et al., *Use of Social Networking Sites in Online Sex Crimes Against Minors: An Examination of National Incidence and Means of Utilization*, 47 J. Adolescent Health 183, 185 (2010).

Sexual predators use social networks to set up their crimes in several ways. One is to "groom" children for sexual abuse. Grooming is a "deceptive process" in which a child victim is manipulated "through a nonsexual approach, which is designed to entice a victim into a sexual encounter." Ilene R. Berson, *Grooming Cybervictims: The Psychological Effects of Online Exploitation for Youth*, 2 Journal of School Violence 11 (2003). An "online predator is skilled at collecting information from children, searching profiles for vulnerable targets, and acquiring personal information on a specific child."

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[12] This article is available at http://www.telegraph.co.uk/technology/facebook/10380631/Facebook-is-a-major-location-for-online-child-sexual-grooming-head-of-child-protection-agency-says.html.

Id. at 12. In online grooming, a "pedophile can hide behind the protective cloak of anonymity" rather than lurk at playgrounds, youth sporting events, or children's venues where someone may become suspicious of special attention directed toward a child. *Id.*

Another approach is for predators to "use information made available on social networking sites to gather information such as where the child lives, his day to day activities and routines, who he hangs out with, etc." Online Predators/Internet Predators, http://www.minormonitor.com/resource/online-predators/. Predators are then "able to gather enough information to commit heinous crimes against children." *Id.*

Section 202.5 bars offenders from taking what is often the critical first step in the sexual assault of a child. It allows law enforcement to stop the activity before a child is actually harmed. Petitioner slights this effort, suggesting, Pet'r Br. 58, that offenders can evade the prohibition by not "posting publicly." They cannot. Because an offender accesses a website when he creates a personal user page, law enforcement can discover registered sex offenders accessing social networking sites even if the offender does not post anything. *See* N.C. Gen. Stat. §§14-202.5(b)(3), -202.5A(b). Social networking websites also can obtain online identifiers of registered sex offenders from States, check those against their members' identifiers, and report access to the proper authorities regardless of whether the offender has posted.

See N.C. Gen. Stat. §14-208.15A; Berkman Ctr. for Internet and Soc'y, *Enhancing Child Safety and Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States*, app. E, Facebook Submission 3 (2008) (stating that Facebook "works closely with law enforcement" and "check[s] new users at sign-up and review[s] existing users" against registry lists).

And petitioner denies reality when he asserts, Pet'r Br. at 59-60, that social networking sites are "inhospitable environments" for potential predators because they would have to create an "online identity" and leave "an indelible trail of evidence." Many registered sex offenders falsify their identity. It blinks reality to suggest that sexual predators do not use social media to further their crimes.

Petitioner's criticism of Section 202.5 for its supposed underinclusiveness also misses the mark. The General Assembly carefully chose to exclude from the statute's purview sites that provide solely a chat room, message board platform, email, photo-sharing, or instant messenger so as not to effectively ban a huge of number sites on the Web. And carving out such sites made ample policy sense. These chat rooms or messaging services do not allow users to access the transparent level of personal information and photographs available on social networking sites, nor can users of these sites remain invisible to others participating in the feature. A State "may

take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (*per curiam*) (internal quotation marks omitted).

The Legislature's decision to include only sites where the operator "derives revenue" likewise made ample sense. The vast majority of sites that otherwise fit the definition of a social networking site are commercial. The State reasonably chose to tailor the statute to focus on the biggest sites, where the most predators and potential victims would be present.

Registered sex offenders are proportionately far more likely than members of the general public to sexually assault minors. The North Carolina legislature found "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment." N.C. Gen. Stat. §14-208.5. This Court, too, has recognized that convicted sex offenders "are much more likely than any other type of offender to be rearrested for a new rape or sex assault." *Conn. Dept. of Public Safety*, 538 U.S. at 4. Those "predictive judgments," which are entitled to "substantial deference," *Turner Broad. Sys., Inc.*, 520 U.S. at 195 (internal quotation marks omitted), comport with common sense and are supported by social science.

Although petitioner correctly reports that sex offenders had a lower overall re-arrest rate than non-sex offenders, their *sex-crime* arrest rate was four times higher than the rate for non-sex offend-

ers. DOJ Sex Offender Report 61-62. Moreover, that figure almost certainly understates registered sex offenders' recidivism. Researchers "widely agree that observed recidivism rates are underestimates for the true reoffense rates of sex offenders" due to the low frequency with which sex crimes are reported and the large number of sex crimes that are unsolved or not prosecuted. DOJ Sex Offender Report 89-91; *see also* National Institute of Justice, *Reporting of Sexual Violence Incidents* (2010) (finding that sexual offenses are grossly under-reported because of the shame and degradation peculiar to these crimes).[13]

One study showed that only 5 percent of rapes and child sexual assaults self-reported by offenders during treatment were reflected in official records. DOJ Sex Offender Report 91. When polygraphs were used, the number of victims reported by incarcerated sex offenders rose from the average of 2 reported in official records to an average of 18. *Id.* at 61. The average number of offenses to which sex offenders admitted committing rose from 12 to 137. *Id.*

Petitioner contends, Pet'r Br. 58, that a 2009 study showing that only 4 percent of those arrested for solicitation of a minor online were on their state's registry means there is no need for preventative measures like Section 202.5. The study, which collected information concerning online sex crimes during a twelve-month period in 2000-2001 and also during the calendar year of 2006, showed that per-

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[13] The report is available at http://www.nij.gov/topics/crime/rape-sexual-violence/Pages/rape-notification.aspx.

centage had doubled during the five-year span. Janis Wolak *et al.*, *Trends in Arrests of "Online Predators"* 1, 7-9 (Univ. of New Hampshire Crimes Against Children Research Center 2009). This change is hardly surprising as sex offender registries were in their infancy in 2001 and offenders were being added to the lists every year. There is every reason to believe the percentage is much higher more than ten years later as the number of offenders on the registries has continued to grow. *See* PRNewswire, *Number of Registered Sex Offenders in the U.S. Nears Three-quarters of a Million* (Jan. 23, 2012) (noting that in the five years between 2006 and 2011 the number of sex offenders on registries increased 23.2 percent).[14]

C. Section 202.5 does not burden substantially more speech than necessary to achieve its purpose.

A time, place, or manner regulation that promotes a substantial government interest is narrowly tailored if it "does not burden substantially more speech than necessary to achieve its purpose," *i.e.*, if that interest "would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. Past experience, common sense, and social science confirm that alternative approaches would be less effective at promoting the State's compelling gov-

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[14] Available at http://www.prnewswire.com/news-releases/number-of-registered-sex-offenders-in-the-us-nears-three-quarters-of-a-million-137880068.html.

ernment interest in protecting children from sexual predators. The law is therefore narrowly tailored.

Second-guessing the North Carolina Legislature's judgment, petitioner claims that Section 202.5 is broader than necessary, and that less speech-restrictive measures could as effectively achieve the State's objective of protecting children from sexual predators. Neither contention is correct.

1. Section 202.5 is not overbroad.

a. Section 202.5 excludes from its purview all sites other than those through which registered sex offenders can access information about minors by viewing a personal page containing identifying information about the creator of the page, and which can link to other such pages on the site. Petitioner nonetheless faults the statute for reaching *all* registered sex offenders, including those whose prior conviction was not for sexually assaulting a minor. His criticism is misplaced.

As an initial matter, most registerable offenses pertain or can pertain to sex offenders who assaulted children. *See* N.C. Gen. Stat. §14-208.6. Petitioner wholly fails to substantiate *how many* registered offenders did not assault minors. Vague, unsupported assertions surely cannot meet the burden of showing "substantial overbreadth."

In any event, North Carolina included these offenders under the legislation for good reason. Section 202.5 protects minors who are likely to

frequent social networking sites. Minors old enough to use such sites are targeted not only by preferential offenders who seek only adolescents but also by situational sexual offenders who seek any victim who may be vulnerable. Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis* 34 (2010).

Research shows a high cross-over rate for sexual offenders, particularly for offenders who commit the types of serious sexual crimes to which North Carolina's registry statute applies. Specifically, studies show that adult-victim rapists "often sexually assault children," with the majority of studies finding "rates in the range of 50 to 60 percent." DOJ Sex Offender Report 61-62. Studies also show that "incest offenders often sexually assault children both within and outside their family," and that "64-66 percent of incest offenders report sexually assaulting children who they were not related to." *Id.* These "[i]ndiscriminate offenders, also known as mixed offenders, report sexually abusing both adults and children equivalently." *Id.* at 65. "Taken together, crossover findings suggest that traditional typologies based on victim type may not be useful to allocate resources, evaluate risk, or devise individualized treatment interventions." *Id.* at 63.

Section 202.5's inclusion of all registered sexual offenders is well-founded. The law would be far less effective in protecting minors if registered sex offenders whose past crime(s) involved adults were excluded from coverage.

b. Section 202.5 is a preventative measure that strives to stop child sex offenders *before* they commit sex offenses. Petitioner asserts that preventative measures that restrict speech are virtually per se overbroad and invalid. That is incorrect. Section I(B), *supra*, explained that preventative measures that regulate the time, place, or manner of speech are subject to intermediate review. Further, this Court has upheld preventative measures against First Amendment challenges.

For example, in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Court upheld a statute criminalizing material support to terrorists, even as applied to speech intended to "promot[e] peacable, lawful conduct." *Id.* at 30. Applying strict scrutiny, the Court concluded that such speech made terrorist "attacks more likely to occur" by indirectly "bolster[ing] the terrorist activities of the organization." *Id.* at 35, 36.

And in *Burson v. Freeman*, the Court upheld a law creating a 100-foot "campaign-free zone" around a polling place, even though it suppressed content-based political speech. 504 U.S. 191. Tennessee argued that the "campaign-free zone" was necessary to further its compelling interests in protecting the right of its citizens to vote freely and to vote in an election conducted with integrity and reliability. *Id.* at 198-99. The Court agreed, rejecting respondent's contention that the law was overinclusive "because States could secure these same compelling interests with statutes that make it a misdemeanor to inter-

fere with an election or to use violence or intimidation to prevent voting." *Id.* at 206. The Court found that such laws, which Tennessee had on the books, "fall short of serving a State's compelling interests" because they deal only with the worst acts and because many of those acts go undetected by the police. *Id.* at 208-09.

Similarly here, although North Carolina laws punish sex offenses against children, the Legislature recognized that "efforts to protect communities, conduct investigations, and quickly apprehend offenders" are not succeeding. N.C. Gen. Stat. §14-208.5. When a State is having difficulty directly enforcing a criminal law barring violent attacks, it is perfectly reasonable for the State to take measures to stop the attacks from occurring in the first place. Section 202.5 does this by cutting off a fertile source of information that predators use to facilitate child sexual abuse. *See Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) (plurality) (government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").

c. Preventative measures are all the more appropriate when the restrictions apply only to individuals who have proven themselves unable to abide by society's laws. As discussed in §I(A), *supra*, States and the federal government have long found it appropriate and necessary to impose civil disabilities on persons who committed crimes. The very purpose of many of those laws was to guard against the *potential* for harm by convicts, rather than to wait for the

crimes to occur. *See, e.g., Smith*, 538 U.S. at 103; *Voisine v. United States*, 136 S. Ct. 2272 (2016) (holding that persons convicted of a misdemeanor crime of domestic violence are barred from possessing firearms, even if the misdemeanor involved mere reckless conduct).

2. Other proposed methods of protecting children would be less effective.

A regulation is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U.S. 675, 689 (1985). The question is whether the proposed alternative would promote the government interest as effectively. None of the alternatives proposed by petitioner meets that test.

a. Petitioner proposes, Pet'r Br. 47-49, a law making it a crime to harvest information on social networking sites for the purpose of targeting children. He fails to explain, however, how such a prohibition would be administered or how it would prevent sex offenses from being perpetrated. Most perpetrators would have completed or at least attempted their abuse of victims before the harvesting could ever be discovered. An anti-harvesting law would therefore accomplish nothing more than existing laws criminalizing the sexual assaults themselves—laws whose inability to solve the problem prompted the Legislature to enact Section 202.5 in the first place.

b. Similarly, petitioner contends the Legislature could have enacted statutes distinguishing between wrongful and innocent access of social networking sites. But laws punishing specific contact with children on social networking websites or punishing entrapment of children via those websites would not prevent registered sex offenders from secretly obtaining information to use in grooming children. And until a sex offense is committed or attempted, it would be difficult to know whether information was being harvested for a proper or illicit purpose.

c. Petitioner next posits, Pet'r Br. 49-50, that the General Assembly could have specified that access of a website for a lawful purpose would not be a crime, akin to how North Carolina's "cyberstalking" law operates. *See* N.C. Gen. Stat. §14-196.3(e). The comparison is inapposite.

North Carolina's cyberstalking law contemplates communication being made via computer and provides that it "does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others." *Id.* Section 202.5, by contrast, tackles conduct—such as harvesting information about a child's habits and interests—that does not require direct communication between the predator and the victim.

d. Nor are additional law enforcement efforts, including undercover operations, an equally effective alternative. Pet'r Br. 50-51. North Carolina adopted

Section 202.5 after concluding that, even with significant law enforcement investigations, it was not making a sufficient dent on the problem. As noted above, only a small percentage of child sex offenses is reported, and only a small percentage of those reported offenses results in arrests.

Contrary to petitioner's suggestion, these problems are not readily solved because registered sex offenders already must provide to authorities "[a]ny online identifier that the person uses or intends to use." N.C. Gen. Stat. §14-208.7(b)(7). Many registered sex offenders—like petitioner—falsify their identities to access a social networking site. Center for Identity Management and Information Protection, Utica College, *Hiding in Plain Sight? A Nationwide Study of the Use of Identity Manipulation by Registered Sex Offenders* 68 (2015).[15]

Petitioner is equally off the mark in proposing that the State require website operators to ensure that teenagers have adult permission before establishing accounts and giving parents ongoing access. Even assuming such a law would be constitutional, *but see Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), any marginal reduction in the number of children on those sites would hardly stop predators from gathering information—and using

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[15] The study is available at www.utica.edu/academic/institutes/cimip/Hiding_in_Plain_Sight.pdf.

that information for grooming either online or in person—about the many children who would remain.

e. Petitioner next proposes, Pet'r Br. 51-52, that the State be content to leave it to individual judges, in their discretion when sentencing individual sex offenders to supervised release or parole, to "impose[] limited-duration conditions" on their use of computers. Of course, judges have long had, and continue to have, that power. Had it satisfactorily resolved the crisis, Section 202.5 would not have been needed.

Conditions of parole necessarily apply only as long as a sex offender is on parole. While offenders may comply with the conditions during this limited period, this does not prevent them from repeating their crimes once they no longer are on parole. And even if the use of computer monitoring software would withstand Fourth Amendment scrutiny, *see Doe v. Nebraska*, 734 F. Supp. 2d 882, 902-03 (D. Neb. 2010), it is unlikely that such monitoring would accomplish the goal of stopping child sex crimes before they occur. At best, such monitoring would merely provide evidence for use after an offense was committed.

f. Petitioner also fails to show how an individualized assessment of sex offenders to determine whether they are "sexually violent predators," as approved in *Kansas v. Hendricks*, 521 U.S. 346 (1997), would be as effective in promoting the State's interest in preventing child sex crimes. North Carolina has properly determined that all registered sex

offenders present a danger to children for the reasons set out in §II(C)(1), *supra*. Indeed, North Carolina already provides for an individualized determination of whether an offender is a "sexually violent predator" for purposes of determining the length of time an offender must remain on the registry and therefore barred from social networking websites. *See* N.C. Gen. Stat. §§14-208.20 (requiring for a presentence investigation and court determination under certain circumstances as to whether an offender is a "sexually violent predator"); -208.23 (requiring lifetime registration for a "sexually violent predator").

g. Nor, finally, are the statutes Louisiana and Nebraska adopted less-restrictive alternatives that are equally effective. *But see* Pet'r Br. 53-54. Nebraska's statute, invalidated in *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012)—unlike Section 202.5—prohibited access to "instant messaging" and "chat room service" in addition to social networking sites. Neb. Rev. Stat. §28-322.05. By encompassing media not utilized for secretly gaining information concerning children, the statute was not as narrowly tailored as Section 202.5.

Louisiana's statute bans from social media registered sex offenders who committed their crimes against minors or with a computer. To the extent the law allows registered offenders who assaulted adults and did not use a computer to use social media, it is not as effective as North Carolina's law for the reasons set out in §II(C)(1), *supra*.

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There is no administrable and effective alternative to Section 202.5 for preventing the harvesting of information used to groom potential victims of child sex abuse. Without Section 202.5, the State's substantial interest in protecting children from sexual abuse would be achieved less effectively.

D. Section 202.5 leaves open ample alternative channels.

Properly construed to apply only to true social networking sites, Section 202.5 leaves open ample "alternative channels of communication." A sex offender may access any site on the Internet that does not fall under the definition of "commercial social networking sites" or that does not allow members under the age of 18. This includes social networking sites for adults only, social networking sites with limited features, non-commercial social networking sites, and government sites. He can navigate to and post on popular sites like Slate.com, DrudgeReport.com, and Politico.com. He can go to commercial sites like eBay, Yelp, and Amazon.com.

A sex offender can also create his own web page, blogs, and podcasts, and visit those of others. He can visit websites that provide solely a chat room, message board platform, email, photo-sharing, or instant messenger. He may take out advertisements on any site on the Internet, and use mail exploders to send his messages, and, yes—he may even have a friend post a message on Facebook and directly attribute the message to him. He could, as petitioner mock-

ingly suggests, Pet'r Br. 60, have a friend print out a photo off of Facebook for him. But even if it were a photo of the entire middle school cheerleading squad, the registered sex offender would not be able to navigate from this photo to find out the cheerleaders' individual interests or vulnerabilities.

The specific activities petitioner says he wants to do on Facebook, Pet'r Br. 18-19, can also be easily achieved through Internet sites dedicated to those activities. While social networking sites might be easy and popular "one stop" sites for certain uses, innumerable other sites enable him to exercise his religion, petition a public servant, send a family member a photo, or learn where a local food truck can be found for lunch. *See, e.g.*, https://w2.vatican.va/content/francesco/en.html (Vatican site with Pope Francis's letters, messages, prayers, speeches, daily meditations); https://www.burr.senate.gov/ (Senator Richard Burr's web page with contact information); https://www.shutterfly.com/nav/signedOutShare.sfly (free private photo sharing site); https://www.foodtrucksin.com/city/raleigh_nc; http://trackintrucks.com/RDU/ (sites locating and discussing local food trucks in Raleigh).

The principal case upon which petitioner relies, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), has little in common with this case. *City of Ladue* involved a ban on residential signs, a means of communication this Court found to be "venerable" and "both unique and important" based on the distinct message such signs convey because of their location and close

identity with the speaker, their affordability, and the "special respect for individual liberty in the home." *Id.* at 54-58. There is no unique and special regard for individual liberty on social networking sites, which can and do exclude sex offenders from using them. *See Restriction or Ban of Social Networking Use for Sex Offenders Compilation* 1 (2013) (noting that "[t]wo of the largest social networks, Facebook and MySpace forbid sex offenders from using their web services").[16] Banning access to Facebook cannot be compared to a government effort to limit an individual's ability to speak on his own property.

Petitioner insists, however, that social networking sites are "unique" and that "[t]here are truly no alternatives." Pet'r Br. 55, 57. That cannot be the test. If an alternative channel of communication had to be a perfect substitute, few if any time, place, or manner restrictions would be upheld. All litigants challenging restrictions on a particular channel of communication prefer that channel to others based on its particular features. But the First Amendment allows the government to restrict access to particular means of communication where ample *alternative* ways to communicate remain. While perhaps there is no single "alternative channel" that may currently equal Facebook, the vast array of different sites that remain available to sex offenders—but on which minors cannot be easily and invisibly identified—

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[16] Available at http://www.ndaa.org/pdf/Sex%20Offenders%20and%20Social%20Networks_2013.pdf.

provides ample alternative channels of communication to social networking sites such as Facebook.

III. Section 202.5 is Constitutional as Applied to Petitioner and On Its Face.

Petitioner's claim fails both as applied to him and as a facial challenge to the statute.

1. He insists, with little explanation, that "[a]t a bare minimum, Section 202.5 may not constitutionally be applied to [him]." Pet'r Br. 61. To the contrary, even if the statute is unconstitutional in some of its applications, no First Amendment right of his was infringed in this case.

First, petitioner has never disputed that Facebook clearly falls under Section 202.5 or that he knew he was prohibited from accessing commercial social networking sites. Indeed, he signed a document acknowledging his awareness of this, J.A. 138-40, and later stated that he knowingly violated Section 202.5 because he thinks the law is "ridiculous" as applied to him since he is "not a pedophile."[17] He has no first-party standing, therefore, to assert vagueness or that the statute is overbroad because it purportedly applies to sites such as nytimes.com. Nor, because he committed his sex offense against a minor, does he have first-party standing to object to the law's inclusion of offenders whose past crimes were against adults.

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[17] John H. Tucker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, Indyweek (May 29, 2013).

Second, Facebook does not consider it at all ridiculous to prohibit sex offenders such as petitioner from its site. It expressly bars them, stating in its terms of service that, "You will not use Facebook if you are a convicted sex offender."[18] Facebook's ban on sex offenders is not mere happenstance. The Attorneys General of 49 States investigated Facebook and MySpace out of concern that sexual predators were using those sites to stalk children. These investigations led Facebook and MySpace to enter into agreements with the Attorneys General under which they implemented a series of steps to better protect children from predators.[19]

Facebook's policy banning sex offenders means petitioner had no right to use that site. Section 202.5, as applied to petitioner, therefore is akin to a state law making it a crime to trespass on another's property. *Cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (rejecting First Amendment claim brought by

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[18] Terms of Service, Statement of Rights and Responsibilities, Registration and Account, item 6 (available at www.facebook.com/legal/terms).

[19] *See* Joint Statement on Key Principles of Social Networking Sites Safety (Jan. 14, 2008) (MySpace) (available at http://www.ncdoj.gov/getattachment/78eac9be-5ee9-4ffe-b2fb-1e76da3a4574/MySpace-Agreement-Joint-Statement-on-Key-Princip.aspx); Joint Statement on Key Principles of Social Networking Sites Safety (May 8, 2008) (Facebook) (available at http://www.nj.gov/oag/newsreleases08/Facebook-Joint-Statement. pdf); *see also*. Marion A. Walker, *Facebook gives sex offenders the boot*, Feb. 19, 2009 (available at http://www.nbcnews.com/id/29289048/ns/technology_and_science-security/t/facebook-gives-sex-offenders-boot/#.WG1a4hszVMw) .

person threatened with arrest for trying to "distribute handbills on [shopping mall owner's] private property contrary to its wishes and contrary to a policy enforced against all handbilling"). Petitioner fails to explain how North Carolina's statute can be unconstitutional as applied to him for "suppressing" speech he had no independent lawful right to make.

2. Nor can petitioner obtain relief on the ground that Section 202.5 violates the First Amendment rights of others. He broadly asserts that "[b]y criminalizing access without requiring any proof of wrongful intent or actual harm, the law may fairly be said to have *no* legitimate sweep." Pet'r Br. 61. That merely restates his categorical objection to preventative time, place, or manner laws—a contention refuted in §§I(B) and II(C)(1), *supra*.

To the extent he is arguing that a criminal statute must require proof of intent to harm in order to pass constitutional muster, he is wrong. For instance, criminal trespass may simply require a showing of the trespasser's knowledge that he lacks a privilege to be present; no intent to cause mischief after entry is required. *See Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2005).

Finally, petitioner's contention, Pet'r Br. 62, that Section 202.5 is "facially unconstitutional" because "[i]t is substantially overbroad" also fails for reasons previously discussed. Properly construed, the law bars access only to social networking sites as commonly understood—*i.e.*, Facebook, not nytimes.com. No showing has been made that any

applications of the statute, let alone a "substantial amount" of them, *United States v. Williams*, 553 U.S. 285, 292 (2008), would be unconstitutional.

CONCLUSION

The decision of the North Carolina Supreme Court should be affirmed.

Respectfully submitted,

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